

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CARLOS VICTORINO, individually and  
on behalf of other members of the general  
public similarly situated,

Plaintiff,

v.

FCA US LLC, a Delaware limited liability  
company,

Defendant.

Case No.: 16cv1617-GPC(JLB)

**ORDER:**

**1) DENYING PLAINTIFF’S  
MOTION TO ASSOCIATE KIESEL  
LAW LLP AS CO-TRIAL COUNSEL;**

**2) GRANTING PLAINTIFF’S  
MOTION TO APPOINT KIESEL  
LAW LLP AS CO-CLASS  
COUNSEL; AND**

**3) GRANTING DEFENDANT’S  
MOTION FOR ORDER REQUIRING  
CORRECTIVE CLASS NOTICE**

**[Dkt. Nos. 388, 390.]**

Before the Court is Plaintiff and the Class’ motion to associate Kiesel Law LLP as co-trial counsel, or in the alternative, to appoint Kiesel Law LLP as co-class counsel. (Dkt. No. 390.) Defendant filed an opposition. (Dkt. No. 395.) Plaintiff filed a reply.

(Dkt. No. 398.) Also before the Court is Defendant’s motion for order requiring corrective class notice. (Dkt. No. 388.) Plaintiff filed an opposition. (Dkt. No. 396.) Defendant filed a reply. (Dkt. No. 397.)

Based on the reasoning below, the Court DENIES Plaintiff’s motion to associate Kielsel Law LLP as co-trial counsel, GRANTS Plaintiff’s motion to appoint Kiesel Law LLP as co-class counsel, and GRANTS Defendant’s motion for corrective class notice.

### **Background**

On October 17, 2019, the Court granted Plaintiff Carlos Victorino’s renewed motion for class certification and certified a Class consisting of “[a]ll persons who purchased or leased in California, from an authorized dealership, a new Class Vehicle primarily for personal, family, or household purposes.” (Dkt. No. 318 at 24.) The Court appointed Plaintiff Carlos Victorino as the class representative and Capstone Law APC as class counsel. (Dkt. No. 318.)

After full briefing regarding disputes over the class notice and notice plan, (Dkt. Nos. 350, 351, 352), on August 27, 2020, the Court granted in part Plaintiff’s renewed motion for approval of proposed class notice and notice plan. (Dkt. No. 353.) The proposed long form notice asks “Do I have a lawyer in this case?” and provides the following response:

The Court decided that the law firm Capstone Law APC is qualified to represent the class, and appointed it as “Class Counsel.” Capstone Law is experienced in handling similar class action cases. More information about these law firms, their practices and their lawyers’ experience is available at [www.capstonelawyers.com](http://www.capstonelawyers.com).

(Dkt. No. 350-4. Zhody Decl., Ex. 2 at 7.<sup>1</sup>) On the question, “How will the Lawyers be paid?”, the long form notice provides,

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<sup>1</sup> Page numbers are based on the CM/ECF pagination.

1 If Class Counsel is successful in getting money or other benefits for the  
 2 class, they will ask the Court to recover their fees and expenses associated  
 3 with this case. You won't have to pay these fees and expenses out of your  
 4 own pocket. If the Court grants Class Counsel's request, the fees and  
 5 expenses would be either deducted from any money obtained for the class or  
 6 paid separately by FCA US.

7 (*Id.*)

## 8 Discussion

### 9 A. Motion to Associate Kiesel Law LLP as Co-Trial Counsel

10 Plaintiff asks that the Court allow Kiesel Law LLP ("Kiesel Law") to associate in  
 11 as co-trial counsel because it will benefit the class due to Kiesel Law's extensive trial  
 12 experience and success. (Dkt. No. 390-1 at 3.) Defendant opposes arguing that Plaintiff  
 13 cannot circumvent Rule 23 by seeking to associate in another law firm. (Dkt. No. 305 at  
 14 4-5.)

15 Plaintiff does not provide any on point legal authority to support an association of  
 16 counsel after a class has been certified and notice disseminated. Unlike a non-class  
 17 action civil case, Federal Rule of Civil Procedure 23 governs this case. *See Shady Grove*  
 18 *Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010). While Rule  
 19 23(g) provides for the appointment of class counsel, it does not provide for an association  
 20 of counsel. In fact, Plaintiff relies on cases addressing the appointment of additional  
 21 class counsel and not an association of additional counsel. (*See* Dkt. No 390-1 at 3.)  
 22 Accordingly, the Court DENIES Plaintiff's motion to associate Kiesel Law as co-trial  
 23 counsel as legally unsupported.

### 24 B. Motion to Appoint Kiesel Law as Co-Class Counsel

25 Plaintiff, alternatively, moves to appoint Kiesel Law as co-class counsel under  
 26 Rule 23(g). (Dkt. No. 390-1 at 4.) Defendant responds that Plaintiff has failed to satisfy  
 27 three of the four factors to support the appointment of Kiesel Law as class counsel and  
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1 adding class counsel will render the notice stating who is class counsel false. (Dkt. No.  
2 395 at 6.) In reply, Plaintiff argues he has addressed the four factors and the notice is not  
3 false because Capstone Law still remains class counsel. (Dkt. No. 398 at 5-6.)

4 Rule 23(g)(1)(A) requires that courts consider the following factors in appointing  
5 class counsel: “(i) the work counsel has done in identifying or investigating potential  
6 claims in the action; (ii) counsel's experience in handling class actions, other complex  
7 litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the  
8 applicable law; and (iv) the resources that counsel will commit to representing the class.”  
9 Fed. R. Civ. P. 23(g)(1)(A). Rule 23(g)(4) also requires that class counsel “must fairly  
10 and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(4). In  
11 appointing class counsel, the Court “may make further orders in connection with the  
12 appointment.” Fed. R. Civ. P. 23(g)(1)(E).

13 The Court concludes that the four factors have been satisfied. On the first factor,  
14 because Kiesel Law is coming in to try the case and not to investigate or identify  
15 potential claims, this factor is not relevant. Kiesel Law also has sufficient experience in  
16 not only class actions but has handled vehicle warranty class actions and is  
17 knowledgeable about the applicable law. (Dkt. No. 390-3, Kiesel Decl. ¶¶ 4, 6; Dkt. No.  
18 390-1 at 6, 8.) Finally, on the fourth factor, Kiesel Law has stated it is willing and able to  
19 serve and has the means and willingness to assist class counsel. (Dkt. No. 390-3, Kiesel  
20 Decl. ¶¶ 9-10.)

21 In opposition, Defendant argues that having two law firms will lead to  
22 inefficiencies, and duplication of work; however, because Kiesel Law is being brought in  
23 to conduct trial, this argument is not well taken as the discovery and motion practice have  
24 been completed. However, in the event that Plaintiff prevails and attorneys’ fees are at  
25 issue, the Court will carefully review the attorney fee records to ensure there is no  
26 unnecessary duplication of work with the appointment of Kiesel Law as co-class counsel.

1 Defendant also contends the Court should consider that the class notice, which  
2 informed class members that Capstone Law APC is “Class Counsel”, would be rendered  
3 false by appointing Kiesel Law as co-class counsel. (Dkt. No. 395 at 7.) Defendant  
4 explains that class members relied on counsel’s information in the notice in deciding  
5 whether to opt out or stay in the class and they have a due process right to receive  
6 accurate information. (*Id.*) It further maintains that it has a due process right in making  
7 sure the information in the notice remains accurate. (*Id.*) Plaintiff summarily responds  
8 that the notice is accurate since Capstone Law APC will remain as class counsel. (Dkt.  
9 No. 398 at 6.)

10 Neither party has provided any caselaw in support of their position whether the  
11 notice should be updated to reflect the appointment of Kiesel Law as co-class counsel.  
12 The Court is also unable to locate any authority on this issue. Typically, district courts  
13 have granted motions to appoint additional class counsel but they have been unopposed  
14 and granted prior to the class notice being disseminated. *See e.g., Krommenhock v. Post*  
15 *Foods, LLC*, Case No. 16-cv-04958-WHO, 2020 WL 2322993, at \*3 (N.D. Cal. May 11,  
16 2020) (granting motion to appoint additional class counsel as unopposed because the  
17 expert work and trial in this case will be extensive and complex but prior to class notice  
18 being issued); *Dawson v. Great Lakes Educational Loan Servs., Inc.* 15-cv-475-jdp, 2019  
19 WL 6619325, at 1 (W.D. Wisc. Dec. 15, 2019) (granting unopposed motion to appoint  
20 additional class counsel appointment as appropriate under Federal Rule of Civil  
21 Procedure 23(g)(1) before second round of class notice); *Jermyn v. Best Buy Stores, L.P.*,  
22 No. 08 Civ. 214(CM), 2011 WL 280798, at \*1 (S.D.N.Y. Jan. 18, 2011) (granting  
23 unopposed motion to appoint additional counsel after class was certified but before class  
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notice<sup>2</sup>); *but see Kaplan v. S.A.C. Capital Advisors, L.P.*, Case NO. 12 Civ. 9350 (NRB), Dkt. 283 (S.D.N.Y. July 5, 2016) (granting unopposed motion for appointment of additional class counsel after class certification and after class notice).

To ensure that class members are informed of the appointment of co-class counsel, Plaintiff shall issue an amended notice. The Court DIRECTS to parties to engage in a meaningful meet and confer on the language for the amended class notice. To the extent they disagree, either party may seek leave of court seeking its guidance.

### **C. Defendant’s Motion for Order Requiring Corrective Class Notice**

Defendant moves for an order requiring Plaintiff to “provide an explanation for how the recipients of the 4,908 class notices were identified, including whether Plaintiff limited the recipients to only those persons who were original purchasers or lessees of new vehicles” and “provide a corrective notice to those recipients who were not original purchasers or lessees of new vehicles, and thus not members of the certified class.” (Dkt. No. 388-1 at 9.) Plaintiff does not directly address why notices were sent to 4,908 addresses but it appears that CPT Group Inc. (“CPT”), the class administrator, received contact information extracted from VINs provided by counsel and sent notices to the mailing list that contained 4,908 records. (Dkt. No. 396 at 8.) Plaintiff further argues that the class notice need not be perfect and may be overinclusive. Moreover, recipients of the short and long notice should not be confused because the notices define that only those who acquired a new vehicle are class members. (*Id.* at 5-6.)

According to the notice procedure, on April 9, 2021, Defendant provided VINs of 1,978 Dodge Dart vehicles originally sold or leased in California to Plaintiff. (Dkt. No. 388-1 at 4.) Then IHS Markit, a third-party vendor, used the VINs to obtain class

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<sup>2</sup> *Jermyn v. Best Buy Stores, L.P.*, Case No. 08cv214(CM), Dkt. Nos. 150, 151 (S.D.N.Y. Jan. 18 & 20, 2011).

1 members' names and mailing addresses from the California DMV. (Dkt. No. 368.)  
2 Subsequently, CPT used the information and sent out the class notice. (Dkt. No. 388-1 at  
3 4; (Dkt. No. 396-1, Zohdy Decl. ¶ 6.) CPT received a mailing list of 4,908 records, and  
4 on October 19, 2021, class notices were mailed to the 4,908 names on the list. (Dkt. No.  
5 379-1, Dancy Decl. ¶¶ 5, 7.)

6 The Court agrees with Defendant and questions why 4,908 notices were sent out  
7 when there are only 1,978 class vehicles. While the Court was not provided the DMV  
8 records, in prior briefing, the parties did not disagree that the DMV records would have  
9 identified purchasers of new vehicles and those should have been the ones that should  
10 have received a notice. Moreover, in the Court's order re: DMV release of class member  
11 information, the DMV was ordered to release the "names and addresses of original  
12 owners and lessees of the vehicles associates with the titles of the VINS at issue . . . ."  
13 (Dkt. No. 368 at 2.) It appears that DMV may have provided the names and address of  
14 all owners and lessees of the class vehicles.

15 In light of the fact that an amended class notice will be provided to appoint Kiesel  
16 Law as co-class counsel, the Court GRANTS Defendant's motion for corrective class  
17 notice. The Court again DIRECTS to parties to engage in a meaningful meet and confer  
18 on the language for the amended class notice. To the extent they disagree, either party  
19 may seek leave of court seeking its guidance.

20 Accordingly, the Court GRANTS Defendant's motion for an order requiring  
21 corrective class notice and DENIES Defendant's motion requiring Plaintiff to provide an  
22 explanation for how the recipients of the 4,908 class notices were identified as  
23 unnecessary.

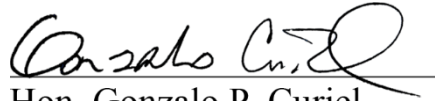
### 24 Conclusion

25 Based on the above, the Court DENIES Plaintiff's motion to associate Kiesel Law  
26 LLC as co-trial counsel, GRANTS Plaintiff's motion to appoint Kiesel Law as co-class  
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1 counsel and GRANTS in part Defendant's motion for order requiring corrective class  
2 notice. Plaintiff shall issue an amended notice as soon as practicable. The hearing set on  
3 April 22, 2022 shall be vacated.

4 IT IS SO ORDERED.

5 Dated: April 14, 2022

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7 Hon. Gonzalo P. Curiel  
8 United States District Judge  
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